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No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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10 pp

TABLE OF AUTHORITIES

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Respondents acknowledge the conflict among the circuits on the issue presented in this case. Melendez Carrion Br. in Opp. 10 ("it is undeniable that the various courts of appeals have adopted diverse approaches and emphases in applying the immediate sealing requirement").[1] They argue, however, that resolution of the conflict is unwarranted for several reasons.

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[1] There are nine respondents in this case. Respondents Ivonne Melendez Carrion, Isaac Camacho Negron, Elias Castro Ramos, and Hilton Fernandez Diamante filed a consolidated opposition that will be referred to as "Melendez Carrion Br. in Opp." Respondents Angel Diaz Ruiz, Orlando Gonzales Claudio, Filiberto Ojeda Rios, and Jorge Farinacci Garcia filed a separate consolidated opposition that will be referred to as "Diaz Ruiz Br. in Opp." Respondent Luis A. Colon Osorio has not responded to our petition.

1. Respondents note that the issue presented here has been the subject of "only" 22 reported court of appeals decisions. That, however, is a considerable number of appellate decisions on a single issue; rather than supporting respondents' point, the number of decided cases indicates that the issue arises with sufficient frequency to warrant this Court's attention. Moreover, while the courts of appeals have only twice ordered the suppression of wiretap evidence on this basis,[2] the disagreement among the appellate courts over the proper standard to apply has been a source of extended litigation in district courts.[3] The fact that most courts have declined to suppress evidence on the theory adopted by the courts below reflects that the Second Circuit's view of the issue is a distinct minority position, but it does not suggest that the issue is unimportant. If the Second Circuit is correct, as respondents claim, electronic surveillance evidence presumably should have been suppressed in many of the cases in which it was admitted. Finally, the need for resolution of the conflict among the circuits is especially great in this area, because electronic surveillance is ordinarily conducted only in the most im-

[2] In addition to the instant case, the court suppressed evidence in *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976).

[3] Respondents assert that the conflict among the circuits is now an insignificant one, since the Second Circuit has adopted a procedure requiring that the government ordinarily seal recordings within two days, that it provide a contemporaneous explanation when the delay in sealing is between two and five days, and that it obtain an extension order from the court if the delay is to be more than five days. See *United States* v. *Massino*, 784 F.2d 153, 158-159 (1986). The *Massino* decision does not render the conflict less important, however, because it did not affect the Second Circuit's commitment to the use of suppression in cases involving unexplained delays, even when the recordings are shown to be unaltered.

portant criminal investigations. See 18 U.S.C. 2516(1). In this case, for example, if the suppression order is upheld the government may not be able to succeed in its prosecution of respondents for their role in a $7.2 million robbery.

2. Respondents suggest (Melendez Carrion Br. in Opp. 14; Diaz Ruiz Br. in Opp. 4-11) that this is not an appropriate case in which to resolve the circuit conflict because the district court made no finding as to the integrity of the Levittown tapes. But that is beside the point. Both courts below held that the Levittown tapes must be suppressed regardless of whether they have been altered. For that reason, the district court and the court of appeals held that there was no need to make a factual finding on that issue. Under the Second Circuit's rule, the evidence would have been suppressed even if the district court had found conclusively that the tapes had not been altered. See Pet. App. 12a-13a, 66a, 83a. It is that holding by the court of appeals that places this case in sharp conflict with the decisions of other circuits holding that the evidence must be admitted if the evidence shows that the integrity of the tapes has been preserved.[4]

[4] Respondents suggest (Melendez Carrion Br. in Opp. 15) that the government's position is based on a factual premise and that the premise is inconsistent with the court of appeals' statement that the delay in sealing "resulted from a disregard of the sensitive nature of the activities undertaken" (Pet. App. 12a). In the first place, however, that characterization of the government's default is not a factual finding. The district court found that the delay in sealing the tapes was the result of the supervising attorney's misunderstanding of the sealing requirement (Pet. App. 76a-77a), and we have not challenged that finding (see Pet. 18 n.13). Furthermore, the resolution of this case does not turn on the correctness of the court of appeals' conclusion that the supervising attorney was negligent. The court of appeals concluded that the supervising attorney was at fault because the government should be held to "a reasonably high standard of at least acquaintance with the requirements of law." Pet. App. 12a. While we

In any event, the district court specifically found that all the other tapes the government wished to introduce were unaltered, including the suppressed Vega Baja tapes. Pet. App. 29a-61a. It based those findings in part on the testimony of experts who had examined and tested 10 original tapes. Significantly, five of the 10 tapes chosen by respondents for expert analysis were recorded at Levittown. Gov't C.A. App. 161-162. Furthermore, the same chain of custody procedures were used for all the tapes, and the district court found that the testimony of the agents who participated in the Title III investigation established "that there were no unauthorized persons with access to the tapes, and that there was no tampering, deletions or additions to the tapes." Pet. App. 45a. Consequently, with respect to the suppressed Vega Baja tapes, all the factual findings necessary to their admissibility have already been made. With respect to the Levittown tapes, the district court will have to make the necessary finding on remand from this Court should the government prevail. But because most of the evidence presented at the suppression hearing regarding the integrity of the Levittown tapes and all other tapes is identical, and the district court has already found that the other tapes have not been altered, there is no reason to expect that a different result will be reached with respect to the Levittown tapes.

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believe that the supervising attorney's error was understandable in light of the state of the law at the time (see Pet. 20-21 & n.14), it is our position that suppression is inappropriate regardless of whether the supervising attorney was negligent, as long as the integrity of the tapes has been maintained.

3. Respondents complain (Melendez Carrion Br. in Opp. 16-17) that substantial pretrial delay will result if the government's petition is granted, and they hint that the government will be able to try its case without their suppressed conversations. But the government certified to the district court that its appeal was not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. See 18 U.S.C. 3731. Respondents point to nothing that would discredit this certification.[5] Moreover, "an interlocutory appeal by the Government ordinarily is a valid reason that justifies the delay." *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).

4. Finally, respondents argue (Melendez Carrion Br. in Opp. 14; Diaz Ruiz Br. in Opp. 11-19) that the recorded conversations should be suppressed on legal grounds unrelated to the sealing delay. As respondents note (Diaz Ruiz Br. in Opp 13-14, 16-17), each of those unrelated claims was rejected by the district court (Pet. App. 107a; Resp. C.A. App. 49-119). The fact that respondents have raised a variety of separate claims is no reason for the Court to deny review of the issue on which the court of appeals decided this case. In the event that respondents are tried and convicted, they can raise those claims in a post-conviction appeal.

The unrelated claims that respondents raise involve issues on which, if they prevail, they will be entitled to broader relief than was granted below, since those claims are not limited to the particular recordings that the district court ordered suppressed, but would support the suppression of all the recorded conversations offered at trial. Those claims therefore do not come within the principle that a party may defend a judgment on any ground raised

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[5] Indeed, respondents asserted in district court that the government will be unable to conduct a successful prosecution without the suppressed evidence. Sept. 14, 1983, Tr. 13; Gov't C.A. Br. 44 n.24.

below, as long as the ground asserted would not entitle the prevailing party to broader relief. See *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788 (1989); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970); *United States* v. *Cores*, 356 U.S. 405, 406-407 n.2 (1958); *United States* v. *Borden Co.*, 308 U.S. 188, 206-207 (1939); *United States* v. *Eccles*, 850 F.2d 1357, 1362 (9th Cir. 1988); *United States* v. *Cardenas*, 748 F.2d 1015, 1023 (5th Cir. 1984); *United States* v. *Williams*, 679 F.2d 504, 507 (5th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Swarovski*, 557 F.2d 40, 49 (2d Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States* v. *Moody*, 485 F.2d 531, 534 (3d Cir. 1973).

In any event, the claims to which respondents alude are wholly without merit. Respondents suggest (Diaz Ruiz Br. in Opp. 12-15) that the tape recordings should be suppressed because the monitoring agents not only recorded the intercepted conversations on reel-to-reel tapes, which were preserved for use as evidence, but also simultaneously recorded the conversations on cassette tapes. The agents used the cassette tapes to help them prepare contemporaneous written summaries of the intercepted conversations. When each summary was completed, the tapes were ordinarily reused. Resp. C.A. App. 49-56. The district court held that this practice was justified, that the agents did not knowingly record conversations on the cassette tapes that were not simultaneously recorded on the original tapes, that the government did not have a duty to preserve those tapes, and that respondents were not prejudiced by the erasure and reuse of the tapes.[6] Resp. C.A.

[6] Thirty-nine of the cassettes were preserved. Four of those 39 tapes contained a few minutes of conversations that were not recorded on the original reel-to-reel tapes. Resp. C.A. App. 69.

App. 66-70. Respondents cite no authority for their claim that the practice was unlawful. In any event, the good-faith erasure of the cassette tapes provides no basis for suppressing the simultaneously recorded reel-to-reel tapes. See *Arizona* v. *Youngblood*, 109 S. Ct. 333 (1988).

Respondents also claim (Diaz Ruiz Br. in Opp. 15-17) that the monitoring agents listened to conversations without recording them. After hearing the testimony of 25 monitoring agents, the district court found no basis in the record for respondents' allegation that the agents regularly and intentionally engaged in such a practice. In those rare instances where such listening occurred, the court found that it was the result of "innocuous human error." Resp. C.A. App. 72-73, 91-108, 117-118. Moreover, the court found that all of the conversations to which respondents were parties were recorded, and that respondents were therefore not prejudiced by the occasional failure to record the conversation of a non-target. Resp. C.A. App. 113-114. Section 2518(8)(a) of Title 18 requires that intercepted conversations shall be recorded "if possible." This provision was intended to assure that the "best evidence" of the intercepted conversations would be available at trial; it was not intended to protect the targets' Fourth Amendment privacy interests. Accordingly, the few instances of listening without recording do not warrant suppression of the lawfully intercepted, taped conversations. See *United States* v. *Clerkley*, 556 F.2d 709, 718-719 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978); *United States* v. *Daly*, 535 F.2d 434, 442 (8th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 434 (1977).

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00409